

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date: September 24, 2015

To: The Commission
(Meeting of October 1, 2015)

From: Helen M. Mickiewicz, Asst. General Counsel
Daren Gilbert, Program Manager, Rail Transit Safety Branch
Patrick S. Berdge, Principal Counsel

Subject: Federal Transit Administration's *Notice of Proposed Rulemaking*
(Public Transportation Safety Program), 49 C.F.R. Part 670, Docket
No. FTA-2015-0009¹

RECOMMENDATION: The CPUC should file comments in response to the *Notice of Proposed Rulemaking* (Public Transportation Safety Program *NPRM*) released by the Federal Transit Administration (FTA) on August 14, 2015. *Public comments must be filed by October 13, 2015.*

BACKGROUND: Title 49 U.S.C. § 5330 created State Safety Oversight Agencies (SSOAs) in 1994. Title 49 C.F.R. Parts 659 et seq. were enacted in 1995. Both the statute and the regulations placed the primary burden of safety on the Rail Transit Agencies (RTAs). This was considered by some to be an unfunded mandate. The CPUC continued to pass safety regulations affecting RTAs throughout this period under its rail safety authority over transit districts in the Public Utilities Code. 49 C.F.R. Parts 659 et seq. required each RTA to have in place a system safety plan, a system security plan, a hazard management plan, accident notification to the SSOA plans, accident investigation plans, annual internal reviews of those plans by the RTAs, and triennial reviews of the RTAs plans and operations by the SSOA. The penalty for non-compliance was a 5% reduction in federal funds for transit projects in the state.

On July 6, 2012 (effective Oct. 1, 2012), Congress enacted 49 U.S.C. § 5329, which provided, that the Secretary of Transportation or his designee shall create and implement a national public transportation safety plan to improve the safety of all public

¹ See the Public Transportation Safety Program *NPRM*, 80 Fed. Reg. 48794 (Aug. 14, 2015).

transportation that congress funds through the FTA. The *Public Transportation Safety Program NPRM* proposes regulations carrying out Congress' enabling legislation under 49 U.S.C. § 5329. The rulemaking adopts Safety Management Systems² as the basis for the FTA's new Public Transportation Safety Program, and establishes the framework for the Secretary of Transportation's authority (delegated to the FTA Administrator) to monitor, oversee and enforce safety in public transportation.

This *NPRM* seeks comment on (1) formal adoption of Safety Management System ("SMS") as the foundation for FTA's safety oversight and regulatory approach; (2) procedures under the Administrator's authority to conduct inspections, investigations, audits, examinations, testing of equipment, facilities, rolling stock and operations of a public transportation system; and (3) procedures under the Administrator's authority to take appropriate enforcement actions, including directing the use or withholding of funds, and issuing directives and advisories. In addition, the *NPRM* describes statutory and proposed contents of the National Safety Plan.

In addition to establishing the SSOA as the primary party responsible for transit safety, the *NPRM* establishes FTA's authority to inspect, investigate, audit, examine and test transit agencies facilities, equipment, safety processes and incidents. It additionally outlines how the FRA will issue general directives (applicable to all recipients or a subset of recipients), special directives (applicable to one or more individual recipients), and advisories (Safety Advisories to individual RTAs, the entire industry or States) as well as outlining that FTA may withhold funding to agencies or states that demonstrate a pattern of serious safety violations or practices. The proposed regulations which are the subject of this *NPRM* would be codified at 49 C.F.R. Part 690.

These regulations are part of a number of current and upcoming FTA rulemakings to carry out the congressional mandate of MAP-21.³ One rulemaking aimed at State Safety Oversight Agencies and requirements for them is currently open, and CPUC filed comments in that rulemaking (FTA-2015-0003). Future rulemaking proceedings are expected on Public Transportation Agency Safety Plans (agency adoption and incorporation of SMS concepts), on the Public Transportation Safety Certification Training Program, and on Transit Asset Management.

California has a long-standing rail transit/fixed guideway safety program that pre-dates the current Federal SSOA program.⁴ The CPUC was designated as the SSOA in 1992 by then Governor Pete Wilson.

² See http://www.fta.dot.gov/tso_15176.html.

³ See <http://www.fta.dot.gov/map21/>.

⁴ Pub. Util. Code § 99152 enacted in 1978, provides the CPUC with safety oversight of public transit fixed-rail guideways.

The Rail Transit Safety Branch of the CPUC's Safety and Enforcement Division is responsible for the CPUC's fixed guideway public transportation safety oversight program, which includes oversight of 15 fixed guideway public transportation systems⁵ in California. Eight systems receive some level of Federal funding, but the remaining six smaller systems receive no federal funds.

As a first step under MAP-21 and in accordance with congressional direction, FTA established certification requirements for SSOA's. The CPUC rail transit safety program was one of only two in the nation that were initially certified based on the current program and structure. Once certified, the CPUC was able to apply for SSOA grant funds, also made available under MAP-21 legislation. The CPUC grant application was approved July 2, 2015.

The FTA's annual funding of approximately \$2.8 million per year to the CPUC is contingent on the CPUC's compliance with the existing and any new or revised requirements that arise from the various FTA rulemakings.

SED has reviewed the FTA *NPRM* and recommends that the Commission authorize staff to prepare formal comments addressing the issues as outlined below for submittal in response to this *NPRM*. SED expects that changes to CPUC General Order (GO) 164-D will likely be necessary at the conclusion of the several FTA rulemakings to update the GO requirements to match these and related Federal regulations.

DISCUSSION AND RECOMMENDATIONS: Staff recommends the CPUC file comments on the following specific issues regarding the FTA's proposed new rules.

FTA's Proposed Rules

I. ADOPTION OF SAFETY MANAGEMENT SYSTEM ("SMS") BY THE FTA AND STATE SAFETY OVERSIGHT AGENCIES.

As the CPUC noted in its comments in the FTA's State Safety Oversight Notice of Proposed Rulemaking, 49 C.F.R. Part 674, Docket No. FTA-2015-0003, (April 28, 2015), at pp. 8-9., the analogy to aviation safety with respect to the proposed

⁵ The 15 fixed guideway public transportation systems in California are the Americana on Brand Trolley, Angel's Flight Railway Company, Bay Area Rapid Transit District (BART), Getty Museum Automated People Mover, The Grove Trolley, Los Angeles County Metropolitan Transportation Authority, North County Transit District's Sprinter, Oakland Airport Connector APM (BART), Port of Los Angeles Red Car Line, Sacramento International Airport Automated People Mover, Santa Clara Valley Transportation Authority, San Diego Trolley Inc., San Francisco Municipal Transportation Agency, San Francisco International Airport AirTrain Automated People Mover, and Sacramento Regional Transit District.

Safety Management System (“SMS”) and its benefits, does not address the difference between highly competitive, technologically advanced, for-profit transportation services and publicly-funded local rail transportation services. The application of SMS principles to rail guideway system safety is undeniably worthwhile; however, the NPRM’s suggested cost efficiencies from SMS are not yet assured.

II. THE ADMINISTRATOR'S PROCEDURES AND AUTHORITY TO CONDUCT INSPECTIONS, INVESTIGATIONS, AUDITS, EXAMINATIONS, TESTING OF EQUIPMENT, FACILITIES, ROLLING STOCK AND OPERATIONS OF A PUBLIC TRANSPORTATION SYSTEM.

This portion of the proposed rule outlines that FTA may conduct investigations, audits and inspections and may issue subpoenas, interview employees, take depositions, require production of documents, and require specific recordkeeping and reporting requirements. The CPUC acknowledges that these are necessary for any meaningful involvement in hands-on safety oversight, however, the specific procedures employed and the way in which the FTA exercises this jurisdiction will be important from the SSOA and rail transit agency perspective. The exercise of that jurisdiction needs to be complementary to the SSOA processes, and FTA needs to assure that its practical implementation does not unnecessarily hamper or otherwise delay an SSOA investigation, audit or inspection.

Further, staff recommends that the FTA provide guidelines describing how it will involve the SSOA in any inspections or investigations initiated by the FTA. Since the SSOAs are charged with primary oversight, it would not be beneficial to have the FTA conduct separate or independent activities which might preclude consideration of the SSOA’s past experiences with the RTA under review. Consequently, protocols should be developed that encourage consultation with the SSOA and RTAs in those FTA investigations and/or inspections and which set forth clear duties and procedures for both the SSOA and the RTA.

The *NPRM* raises the specific question of what constitutes “reasonable time” and “reasonable manner” as it relates to written notices to RTAs that FTA intends to enter the RTA premises and inspect and test equipment and facilities and review records. Staff recommends that the CPUC should support a “reasonable time” of 24 hours when possible. A “reasonable manner” is any process that does not prevent the operator from providing its routine transit service safely, and one that does not put any FTA, SSOA, RTA, or members of the public at unacceptable risk during the process. These rules permit the FTA Administrator to enter RTA premises to “inspect and test a recipient's equipment, facilities, rolling stock, operations, and relevant records.” (*NPRM* at 48794.) The FTA seeks comment on how best to define both “reasonable time” and “reasonable

manner" for the purpose of entering and inspecting equipment, facilities, rolling stock, operations and relevant records.

Staff recommends CPUC support for FTA *unannounced* inspection, testing and records reviews, which may become necessary in some instances.⁶ Of course unannounced activities must be performed safely and in accordance with RTA procedures for accessing facilities and the RTA right-of-way, but FTA should have this authority in addition to the SSOAs.

III. THE ADMINISTRATOR'S PROCEDURES AND AUTHORITY TO TAKE APPROPRIATE ENFORCEMENT ACTIONS, INCLUDING DIRECTING THE USE OF FTA FUNDS OR WITHHOLDING OF FTA FUNDS, AND ISSUING DIRECTIVES AND ADVISORIES.

Staff recommends that the CPUC support the FTA having the regulatory authority to direct that the funds it provides to RTAs be spent to address safety issues. In order to encourage compliance and the highest attention to safety and transit asset management, Federal funds for start-up, maintenance, and operational costs, should be withheld from the RTAs who fail to comply with FTA and SSOA safety requirements. The FTA's proposed rule would be an improvement over past policies which reduced transit funds to the state as a whole rather than the offending RTA. While withholding of funds is somewhat counterintuitive it can be a great motivator. Withholding of funds should only be considered after an RTA has been given ample opportunity to address the safety matter or concern, and should provide for an opportunity RTA to respond to the FTA before the decision to withhold funds becomes final.

Staff further recommends that the CPUC agree that the FTA should encompass authority to issue directives, special directives and safety advisories to a specific operator, a subset of operators, or all the rail transit operators in the nation. The FTA's proposed procedures in the *NPRM* are reasonable. However, the CPUC should note in its comments that these activities should not be undertaken without review and consultation with the SSOA.

⁶ See the Department of Labor, Occupational Safety and Health's provision for unannounced inspections at 29 CFR 1960.31(a), 29 CFR 1960.36(b), California's Department of Industrial Relations, Division of Occupational Safety and Health's provision for unannounced inspections at California Labor Code § 6321, making advance notice of any inspection to be conducted, without authority from the chief or his designees, guilty of a misdemeanor and subject to a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than six months, or by both, and CPUC's powers to conduct unannounced inspections of rail transit agencies, *Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of San Francisco Municipal Transportation Agency, Regarding Ongoing Public Safety Issues*, I.14-01-005, 2014 Cal. PUC LEXIS 44 (Jan. 16, 2014).

IV. THE STATUTORY AND PROPOSED CONTENTS OF THE NATIONAL PUBLIC SAFETY PLAN

The CPUC awaits presentation of the first National Public Transportation Safety Plan and will evaluate the Plan at that time. At present, however, the proposed content appears to contain the essential elements for promoting safety and safety accountability in the rail transit industry. It proposes including safety performance criteria, a definition and criteria for State of Good Repair, vehicle safety performance standards, RTA and SSOA/FTA training requirements, safety advisories and reports issued by FTA, best practices/pilot programs incorporating SMS into transit operations, and providing research, reports, and data on hazard identification and risk management. Here, staff recommends that the CPUC comment that it generally supports the concept of a National Public Transportation Plan and routine updates to that Plan.

V. PROPOSED REGULATION 670.13 REQUEST FOR CONFIDENTIAL TREATMENT

The *NPRM* advises that this section “proposes procedures for a recipient or State to seek confidential treatment of records obtained during the course of activities under section 670.21.” This section also “governs the procedures for requesting confidential treatment of any record filed with or otherwise provided to FTA in connection with its enforcement of statutes or regulations related to safety in public transportation.”

Staff is concerned that an RTA might withhold evidence or information concerning an accident from the CPUC’s accident investigation to later provide that material to the FTA as a means

of preventing public disclosure of the material. As the CPUC noted in its comments in the FTA’s State Safety Oversight Notice of Proposed Rulemaking, 49 C.F.R. Part 674, Docket No. FTA-2015-0003, the CPUC,

cannot withhold its investigative reports or safety information. Any policy, such as that proposed by the FTA in 2005⁷ preventing public disclosure of accident investigations and safety information, is prohibited under California’s Constitution and statutes requiring transparency in government. (See Cal Const, Art. I § 3(b)(1) & (2).) California’s Public Records Act also “...finds and declares

⁷ See the FTA’s suggestion in its April 29, 2005 Rail Fixed Guideway Systems; State Safety Oversight Final Rule, Docket No. FTA—2004—17196, 49 C.F.R. § 659, that safety information such as accident reports be kept confidential. “FTA recommends that each state identify measures to be taken to ensure that safety and security sensitive information is not publicly disclosed.” (70 Fed. Reg. 22562 (April 29, 2005), at 22566.)

that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state" (Cal. Gov. Code § 6250). Except for preliminary or draft reports, accident investigation reports and safety information is not exempt from public disclosure under Cal. Gov. Code § 6254.

(CPUC Comments in FTA-2015-0003, 49 C.F.R. Part 674, (April 28, 2015), at p. 9.)

The CPUC also noted in its April 28, 2015 comments in FTA-2015-0003,⁸

California's Constitution provides in pertinent part:

- (1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
- (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

(Cal Const, Art. I § 3(b)(1) & (2).)

California's Government Code provides:

In enacting this chapter [concerning public records of state or local governmental agencies], the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

(Cal. Gov. Code § 6250.)

⁸ See CPUC Comments in FTA-2015-0003, 49 C.F.R. Part 674, (April 28, 2015), at pp. 9 – 12.

“Public records” includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics...

(Cal. Gov. Code § 6252(e).)

For this reason, staff recommends the CPUC suggest that the FTA’s proposed section 670.13(a)² be modified to read:

The Administrator may grant a recipient’s request for confidential treatment of records on the basis that the records are—
Exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552) unless mandatory disclosure provisions under applicable state law require disclosure....

VI. OTHER SPECIFIC CONCERNS

Staff has the following specific concerns with respect to this *NPRM*:

- a. Definition of “Recipient” - Section 670.5 in the *NPRM* defines “recipient” as: “... *an entity that receives Federal financial assistance under Chapter 53.*” The CPUC and other SSOAs that receive Fixed Guideway Public Transportation State Safety Oversight Formula Grant Fund program funding authorized by 49 U.S.C. 53 fall under this definition of recipient, and therefore will be subject to all the proposed rules for recipients. However, a complete reading of the *NPRM* indicates that the recipient is intended to describe Public Transportation Agencies. The *NPRM* includes many references to equipment, facilities, rolling stock, and operations of public transportation systems operated by a recipient. We assume these references are intended for PTAs and not SSOAs. We ask FTA to clarify this.
- b. One specific comment we believe is important to make is that non-compliance with any safety regulation is an important performance metric, even in the single case. The finding of a trend

² See 80 Fed. Reg. 48794, *supra* at 48801.

is not necessary before remedial action is taken. Safety regulations are a critical risk control, and non-compliance is one of the most valuable predictors of accidents. A proactive approach must recognize non-compliance as an accident precursor and performance metric.

VII. SUMMARY

In summary, staff recommends that the CPUC submit comments in response to the *NPRM* as outlined, and specifically state that the CPUC supports the FTA's efforts to improve public rail transit safety and address mandates Congress has imposed on the FTA. At the same time, the CPUC should recommend FTA's continued support for SSOA programs, which the FTA has indicated are the primary means for assuring public safety in the rail transit industry. In addition, the FTA should ensure that SSOAs are fully engaged in all FTA processes developed under the *NPRM* to implement FTA's more active role in safety oversight as contemplated by MAP-21. It is essential for FTA and the SSOA to coordinate on any specific incident or safety matter that arises so that the FTA and the SSOA can speak with one voice to the RTAs providing a consistent Federal and state message on safety.

Assigned Staff:

Legal Division – Patrick Berdge (PSB, 415-703-1519)

Safety & Enforcement Division – Daren Gilbert (DAR, 916-928-6858);